No. 05-352

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CUAUHTEMOC GONZALEZ-LOPEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The court of appeals held that the denial of a defendant's first-choice counsel requires automatic reversal of a conviction even if the denial had absolutely no impact on the fairness of the proceeding. Respondent does not refute the government's submission that the denial of a defendant's first-choice counsel does not *inherently* prejudice the outcome of a criminal trial. Respondent nonetheless argues that an improper denial of counsel of choice warrants automatic reversal, because such a result, in his view, accords with the Sixth Amendment's history and purpose, as well as sound policy considerations. None of those contentions has merit.

A. The Denial Of The Right To Counsel Of Choice Violates The Sixth Amendment Only When The Denial Adversely Affects The Defendant's Right To A Fair Trial

1. Respondent contends (Br. 9, 12-13, 22-24) that a rule of automatic reversal is justified whenever first-choice counsel is improperly denied because the right to counsel of choice forms the "core" of the Sixth Amendment that protects a defendant's autonomy and the public perception of fairness, independent of the actual fairness of a criminal proceeding. In a similar vein, respondent argues (Br. 29) that because the right to counsel of choice is the "core concept" protected by the Sixth Amendment, whereas the right to the effective assistance of counsel is simply an "implied" right that "emanat[es] from an overall purpose of the Sixth Amendment," the Constitution mandates automatic reversal upon the denial of the right to counsel of choice.

Those contentions cannot be reconciled with the text of the Sixth Amendment, its purpose, or this Court's cases. The Sixth Amendment contains no "Choice of Counsel" Clause

that furthers free-standing autonomy and dignity interests. The Sixth Amendment guarantees an accused "the Assistance of Counsel *for his defence*," U.S. Const. Amend. VI (emphasis added), and the Assistance of Counsel Clause is part of an Amendment that "defines the basic elements of a fair trial." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984).

This Court's decisions accordingly have repeatedly recognized, based on an extensive review of the "historical background" of the Sixth Amendment, that the "*core*" purpose of the right to counsel is to guarantee that the defendant has the assistance of counsel to ensure a fair adversarial process that separates the innocent from the guilty. *United States* v. *Ash*, 413 U.S. 300, 309 (1973) (emphasis added); see *United States* v. *Gouveia*, 467 U.S. 180, 188-189 (1984) ("We have recognized that the core purpose of the counsel guarantee" is to "protect[] the unaided layman at critical confrontations with his adversary.") (internal quotation marks omitted); *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002) ("This right has been accorded, we have said, 'not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'") (quoting *United States* v. *Cronic*, 466 U.S. 648, 658 (1984)); *Wheat* v. *United States*, 486 U.S. 153, 158-159 (1988) (observing that the Sixth Amendment right "was designed to assure fairness in the adversary criminal process" and that "the purpose of providing assistance of counsel 'is simply to ensure that criminal defendants receive a fair trial'") (quoting *Strickland*, 466 U.S. at 689).

Respondent invites the Court to ignore those precedents, and establish a new and additional "core" to the Sixth Amendment that is rooted in individual autonomy and free will, by stitching together historical anecdotes about governmental interference with the choice of counsel in the trials of the Seven Bishops and John Peter Zenger, Br. 13-15, early legislative actions by the States and Congress to ensure the assis-

tance of counsel, Br. 16-17, 19-21, and judicial decisions recognizing a defendant's right to select his own counsel, Br. 17-19. Those anecdotes and authorities establish, at most, the undisputed proposition that "the right to select and be represented by one's preferred attorney is *comprehended* by the Sixth Amendment." *Wheat*, 486 U.S. at 159 (emphasis added). They do not prove that the Assistance of Counsel Clause was adopted to further interests other than the fairness of the trial process. And none of respondent's authorities addresses the precise issue before the Court here: whether a criminal conviction should be automatically reversed without any showing of prejudice.

To the extent that any of respondent's historical authorities even involved the reversal of a criminal conviction, they are inapposite. One of the decisions cited by respondent (Br. 17-18), *Delk* v. *State*, 26 S.E. 752 (Ga. 1896), was decided more than a century after the ratification of the Constitution. The court also relied on the *State's* constitution (*id.* at 753) and did not address the issue whether prejudice is a prerequisite to reversal of a criminal conviction. Respondent also cites (Br. 16) *Word* v. *Commonwealth*, 30 Va. (3 Leigh) 743 (1827), but that decision involved the *complete* denial of counsel because a minor was appointed a guardian to enter a plea and the court refused to permit any argument by counsel.[1]

2. Respondent also places substantial reliance (Br. 22-23) on the dissenting opinions in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 645-646 (1989) (Blackmun, J.,

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[1] Respondent also relies (Br. 18-19) on two other decisions involving reversal of a criminal conviction, *United States* v. *Bergamo*, 154 F.2d 31 (3d Cir. 1946), and *People* v. *Gordon*, 30 N.Y.S.2d 625 (App. Div. 1941) (per curiam), but they too do not discuss the issue presented here. Moreover, the intermediate state court in *Gordon* relied on the state constitution, *id.* at 626, and the court in *Bergamo* found that substitute counsel provided ineffective assistance. 154 F.2d at 35.

dissenting), and *Wheat*, 486 U.S. at 165-166 (Marshall, J., dissenting), and the decisions of this Court construing the right to self-representation as furthering the values of individual dignity and autonomy over concerns about providing an effective defense for the accused. Br. 23 (citing *Martinez* v. *Court of Appeal*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring), *McKaskle* v. *Wiggins*, 465 U.S. 168, 176-177 (1984), and *Faretta* v. *California*, 422 U.S. 806, 819-820 (1975)). Respondent fails to acknowledge, however, that the *majority* in *Wheat* held that the interests served by the right to counsel of choice are cognizable under the Sixth Amendment *only insofar* as they guarantee the defendant a fair trial. This Court held in *Wheat* that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, *the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant*." 486 U.S. at 159 (emphasis added). Accordingly, the Court in *Wheat* concluded that "in evaluating Sixth Amendment claims, *'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.'*" *Ibid.* (quoting *Cronic*, 466 U.S. at 657 n.21) (emphasis added).

Wheat also established that the right to counsel of choice is "circumscribed in several important respects." 486 U.S. at 159. Respondent acknowledges that the right "is not absolute" (Br. 25) and may be subordinate to countervailing interests within the trial court's discretion. U.S. Br. 12-13. The qualified and limited nature of the right to counsel of choice stands in stark contrast to the unqualified and absolute right of a defendant to the effective assistance of counsel, whose denial requires a showing of prejudice. If a defendant whose counsel was professionally incompetent must show prejudice before obtaining relief, so too should a defendant denied his preferred attorney. *Id.* at 13-15.

3. Respondent also fails to acknowledge the mode of analysis established by this Court's precedents, which heretofore have subjected *all* claims of Sixth Amendment denials of the right to counsel to a requirement of prejudice unless "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Mickens*, 535 U.S. at 166; accord *Strickland*, 466 U.S. at 692 (distinguishing ineffective assistance of counsel from "certain Sixth Amendment contexts, [where] prejudice is presumed"); *Cronic*, 466 U.S. at 658 ("Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated" unless the denial of counsel involves "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."); *United States* v. *Morrison*, 449 U.S. 361, 365 (1981) ("The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense.").[2]

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[2] Respondent argues that the Court in *Strickland* found that "a prejudice rule was necessary" because "the availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges," Br. 36 (quoting *Strickland*, 466 U.S. at 690), and "that a defendant-friendly test for ineffective assistance would deter lawyers from representing criminal defendants," Br. 37. The portion of *Strickland* relied upon by respondent had nothing to do with the Court's imposition of a *prejudice* requirement. Rather, the Court relied upon the policy concerns noted by respondent to explain why review of attorney "*performance* must be highly deferential." 466 U.S. at 689-690 (emphasis added). As indicated in the text, the Court in *Strickland* held that a prejudice requirement was warranted because "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-692.

The three decisions relied upon by respondent (Br. 19, 43-44)) involving the right to counsel, *Powell* v. *Alabama*, 287 U.S. 45 (1932), *Chandler* v. *Fretag*, 348 U.S. 3 (1954), and *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), are fully consistent with the above framework. *Cronic*, 466 U.S. at 659-661, made clear that a presumption of prejudice in *Powell* was warranted when the trial court appointed counsel to represent multiple defendants on the day of their capital trial. The Court in *Cronic* explained that "*Powell* was thus a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial." *Id.* at 661.

Similarly, in *Chandler*, 348 U.S. at 5-6, the defendant was completely denied counsel during trial. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland*, 466 U.S. at 692. Finally, this Court explained in *Mickens*, 535 U.S. at 166-168 & n.1, that no showing of prejudice is required in the circumstances presented by *Holloway*, *i.e.*, when counsel, over his objection, is forced to represent multiple defendants with conflicting interests, because a trial with counsel who labors under those conditions is inherently unreliable.

Respondent does not argue that the denial of a defendant's first-choice counsel is *inherently* prejudicial to a defendant's ability to receive a fair trial such that a presumption of prejudice is warranted. U.S. Br. 17-20. Nor does respondent dispute that the rule that he urges would require automatic reversal even where a defendant who is denied his first choice retains equally qualified substitute counsel. *Id.* at 16-17. Respondent relies on the absence of any *documented* "windfall" from an automatic reversal rule. Resp. Br. 11, 36, 38. But reversal of a criminal conviction is never justified, and thus a "windfall" necessarily results, whenever society suffers

the costs and burdens of a retrial even though the denial of counsel of choice made no difference in the outcome.

Respondent's historical examples well illustrate the oddities of a rule of automatic reversal. As respondent explains (Br. 15), when John Peter Zenger was barred from retaining his two preferred counsel, he retained Andrew Hamilton of Philadelphia, who was "[r]eputedly the best lawyer in America" and had "years of courtroom experience." J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 22, 23 (1972). Hamilton successfully defended Zenger "[b]y sheer eloquence, and by following [initial counsel's] original strategy." Resp. Br. 15. Respondent also explains that when the Seven Bishops were tried in 1688, they retained Sir Creswell Levinz along with "an army of other eminent" and "impressive" lawyers." Br. 14; see 2 T.B. Macauley, *History of England from the Accession of James II*, at 345 (1856) (in addition to Livinz, the Bishops retained "almost all the eminent forensic talents of the age," including counsel who were "reputed the two best lawyers that could be found in all the inns of court"). Respondent's rule would require automatic reversal even if a modern-day Andrew Hamilton obtained an acquittal on every count but one in a case involving multiple charges. And automatic reversal would apparently be required even were a defendant denied just one lawyer but otherwise defended by a "dream team" of counsel hand-picked by the defendant. Indeed, respondent's rule presumably would mandate an automatic reversal even had the trial court in this case improperly barred *Dickhaus* from the courtroom instead of *Low*. Cf. Resp. Br. 14 (describing "deliberate care" with which the Bishops chose "the junior counsel").

Respondent's examples are also noteworthy because they reflect the common sense proposition that a defendant denied his first-choice counsel can be presumed to find other counsel (or even a team of other counsel) who will mount a robust

defense and will give the defendant effective control over his defense. The examples also reveal the fallacy in respondent's suggestion (Br. 22-23) that disqualification of a defendant's chosen attorney would necessarily cause a defendant to lose his "individual dignity, autonomy, and free will" or "to be suspicious of any lawyer whom the government allowed to stay in a case." Clients still retain autonomy to select other lawyers. At most, the interests will be seriously implicated in only a subset of cases, yet respondent's rule would require automatic reversal even if none of the interests identified by respondent were infringed in a particular case.

4. A showing of prejudice as a prerequisite to reversal of a criminal conviction does not, as respondent suggests (Br. 25-30-31), mean that trial courts may arbitrarily deny counsel of choice or do so as long as the court concludes that representation by substitute counsel will not prejudice the defense. District courts "must recognize a presumption in favor of petitioner's counsel of choice." *Wheat*, 486 U.S. at 164. Respondent has no basis for suggesting (Br. 31) that courts would undertake (or prosecutors would seek) to disqualify an attorney "on the grounds that the defendant's counsel 'parts his hair on the right.'" Mandamus relief would also be available where the denial of counsel of choice constitutes a clear abuse of discretion. *E.g.*, *United States* v. *Santos*, 201 F.3d 953, 960-961 (7th Cir. 2000); cf. Pet. App. 3a (noting that defendant sought mandamus relief, which appellate court denied).

Acknowledgment that the right to counsel of choice is "comprehended" within the Sixth Amendment and must be respected by trial courts, *Wheat*, 486 U.S. at 159, does not mean that a defendant who suffers an infringement of that constitutionally protected interest is entitled to automatic reversal of his conviction absent any showing of an adverse impact on the outcome. Rather, rejection of an automatic reversal rule is consistent with this Court's approach of "tai-

loring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Morrison*, 449 U.S. at 365; cf. *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999) (footnote omitted) (although "the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence[,] * * * strictly speaking, there is never a real '*Brady* violation' unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."). As is the case with the right to the effective assistance of counsel, requiring a showing of prejudice before there is a completed violation properly balances the Sixth Amendment interest at stake against the societal interest in preserving a conviction that results from a fundamentally fair trial. *Morrison*, 449 U.S. at 364.

B. Practical Considerations Do Not Warrant A Rule Of Automatic Reversal

1. Respondent argues (Br. 10, 31) that a prejudice requirement would give incentives for "overzealous prosecutors" to seek the removal of "particularly effective defense counsel" and would "push[] judges to grant motion to disqualify counsel of choice." That contention conflicts with the strong presumption that public officials will faithfully discharge their public duties. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); U.S. Br. 30. It also conflicts with this Court's rejection of a similar claim in *Wheat*, 486 U.S. at 163 (finding no basis to believe that trial courts would be unduly influenced by arguably manufactured claims of conflict of interest by the government). And it ignores the reality that the relevant substantive law protects the interest in retaining counsel of choice by limiting the circumstances in which a plausible claim for disqualification will exist. Moreover, to the extent this

Court's decision would have any effect on the filing or granting of disqualification motions, a rule of automatic reversal would have the likely effect of chilling both prosecutors and courts from focusing on whether counsel labors under a conflict or is otherwise unqualified to serve as defense counsel. An erroneous disqualification would invalidate a conviction and require a retrial even where first-choice counsel would have made no difference in the outcome. Prosecutors and courts would thus pay a steep and unjustified price for any error in judgment regarding the initial disqualification.

2. Respondent also argues (Br. 33) that a prejudice requirement would give a defendant who is convinced that he was improperly denied his counsel of choice the perverse incentive "to hire an utterly incompetent substitute attorney for the instant trial" in order to obtain a new trial on appeal. But the government's fundamental submission is *not* that a defendant must show that counsel was *incompetent* to obtain reversal. Rather, a defendant must show that representation by first-choice counsel would have created a reasonable probability of a difference in the outcome of the proceeding. U.S. Br. 15-17, 21-24, 30-31. In any event, as respondent ultimately concedes (and as Zenger's retention of Hamilton illustrates), "virtually all defendants will * * * try to obtain the best possible substitute counsel and urge that counsel to follow the same basic strategy as his original counsel would have planned." Resp. Br. 33. The fact that prejudice accordingly may be difficult to show in such circumstances does not mean that the requirement is unjustified; that fact demonstrates the general absence of prejudice from the denial of counsel of choice, as well as the lack of justification for fashioning an automatic reversal rule that is based on a presumption of prejudice. U.S. Br. 23-24.

Respondent also contends (Br. 33-34) that defendants who seek to retain a particular attorney with the intent of pleading

guilty would be precluded from receiving any remedy if counsel of choice were improperly denied, even if that attorney could have negotiated a better plea agreement. It is not at all clear that disqualification disputes precede guilty pleas with any frequency, but in any event, respondent's concern is misplaced. Defendants who go to trial regularly claim that, but for the ineffective assistance of counsel, they would have negotiated an advantageous plea agreement, pleaded guilty, and received a more favorable sentence. See, *e.g.*, *Smith* v. *United States*, 348 F.3d 545, 551-553 (3d Cir. 2003). A defendant who has pleaded guilty also may challenge his sentence on the ground that competent counsel would have urged him to accept an earlier and better plea offer. *United States* v. *Carmichael*, 216 F.3d 224, 226-227 (2d Cir. 2000). Thus, a defendant who pleaded guilty, but who claims that counsel of first choice would have been able to obtain a more favorable plea or sentence, could similarly seek to show that first-choice counsel would have deployed a different strategy that had a reasonable probability of producing a better outcome, either through plea negotiations or through contesting the government's sentencing claims.

3. Respondent also argues (Br. 34-35) that the costs of retrials from an automatic reversal rule would be outweighed by the burdens of evidentiary hearings in collateral proceedings through which a defendant may show prejudice. But that contention completely discounts the harms and costs imposed on victims and society by the automatic reversal of a criminal conviction procured in a fundamentally fair trial. *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). And, moreover, evidentiary hearings (and their attendant costs) are not a foregone conclusion in every case. In any event, evidentiary hearings are regularly conducted under *Strickland*, and any burdens associated with those hearings do not justify dispensing with the requirement that the defendant must show preju-

dice. For similar reasons, respondent errs in relying (Br. 34, 36) on the supposed "years" in prison that defendants might endure while their Sixth Amendment claims are being litigated in collateral proceedings. Given the absence of any reason to presume that a claimed improper denial of counsel of choice prejudiced the defense, there is no basis for distinguishing those claims from those alleging ineffective assistance of counsel.[3]

Respondent also errs in asserting (Br. 30, 35-36) that determining prejudice from a denial of counsel of choice would be complicated or impossible. That argument conflates the unlikeliness that prejudice will actually occur with the difficulty of ascertaining it in the rare case in which it does occur. When the first-choice counsel developed a trial strategy before disqualification, a trial court can more readily determine the actual trial strategy of first-choice counsel than, under *Strickland*, some unknown and entirely hypothetical trial strategy of a competent attorney. In other cases, the assessment involved in determining prejudice from the denial of counsel of choice is not meaningfully different from the prejudice inquiry performed under *Strickland*. U.S. Br. 22-23.

C. The Denial Of Counsel Of Choice Is Not A Structural Error

Respondent argues (Br. 39) that the denial of counsel of choice constitutes a structural error that requires automatic

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[3] For similar reasons, respondent mistakenly argues (Br. 36 n.10) that a prejudice requirement would require the defendant to reveal to the prosecution the defendant's strategy for a retrial. The same "perverse" (*ibid.*) consequences flow from collateral proceedings resolving *Strickland* claims. Defendants routinely reveal their strategies in arguing that counsel should have undertaken an alternative investigation or strategy and that such action would have produced an acquittal. *E.g.*, *Strickland*, 466 U.S. at 699-700 (discussing "evidence that respondent says his trial counsel should have offered").

reversal because the right to counsel of choice "implicates values of personal autonomy that reach beyond ensuring 'proper' trial outcomes" and because "the choice of counsel pervades the entre proceeding." Respondent therefore argues (Br. 38) that the government should not be permitted to show that the denial of counsel of choice constituted harmless error. The government's position, however, is not that it should be required to show that such denial constitutes harmless error, but rather that, absent the defendant's showing that a denial of counsel of choice is prejudicial, the Sixth Amendment is not violated.[4] Moreover, for the same reasons that the Sixth Amendment is not violated absent prejudice, a denial of the right to counsel of choice does not constitute structural error.

1. As discussed, pp. 2-3, *supra*, this Court has repeatedly held that the purpose of the Sixth Amendment Assistance of Counsel Clause is not to promote individual autonomy in the abstract, but to ensure that a defendant receives a trial that can be fairly said to distinguish between guilt and innocence. Because there is no basis for presuming a fundamentally unfair trial from the denial of counsel of choice, the denial is not a structural defect that requires automatic reversal. Similarly, the limited and qualified nature of the right to counsel of choice is at odds with the notion that the denial of the right is so fundamental to our system of justice that the denial should be deemed a structural defect. U.S. Br. 25-26.

Respondent thus is mistaken in asserting (Br. 39) that the right to counsel of choice serves not the "pursuit of the 'cor-

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[4] Conversely, a defendant's showing of prejudice renders the constitutional violation complete, and the government accordingly cannot show that the violation was harmless error. Cf. *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995) (Once a reviewing court has found materiality to show error under *Brady* v. *Maryland*, 373 U.S. 83 (1963), "there is no need for further harmless-error review.").

rect' verdict," but autonomy and dignity interests similar to the right of self-representation. The right to self-representation does not derive from the Sixth Amendment's right to the "Assistance of Counsel" but from other sources in the Constitution. U.S. Br. 29. The right to self-representation also protects an individual's autonomy and dignity even when self-representation would be detrimental to his defense. By contrast, the right to counsel of choice exists solely by virtue of the Assistance of Counsel Clause, and the right may be subordinated to concerns about the fairness of the proceeding. U.S. Br. 28-29. An individual who desires self-representation but is nonetheless forced to proceed to trial with counsel appointed by the court (see, *e.g.*, *Faretta*, *supra*) suffers an affront to his autonomy and dignity substantially different both in kind and in degree from a defendant, such as respondent, who makes the decision to be represented by counsel and in fact is represented by counsel whom he chooses (albeit not as his first choice). U.S. Br. 29-30.

Respondent's historical anecdotes again prove the point. The trial of Zenger cannot be said to have been structurally defective because Zenger, who was not given his first-choice counsel, was nonetheless able to retain the reputed best lawyer in the country, who acted consistent with the defense strategy of his client and his first-choice counsel. And a defendant represented by an "army" (Resp. Br. 14) of lawyers may well be able to expresses an abundance of free will in his selection of counsel, even if he is improperly denied one member of the team.

Respondent argues (Br. 40) that he "should have been allowed to choose" which defense style he preferred—Low's aggressive style or Dickhaus' "tentative and conciliatory" style. But respondent's automatic reversal rule would ascribe structural error to every case, even if second-choice counsel executed the defendant's chosen strategy with greater skill

than the first-choice counsel would have done. This case also is not one in which a defendant was given no choice in the selection of counsel or had counsel foisted upon him, as respondent repeatedly suggests. Br. 4-5, 28, 40-41, 45-46. Respondent does not dispute that he voluntarily retained Dickhaus on the recommendation of Low, his first-choice counsel whose judgment respondent claims he trusts. Nor does respondent dispute that he informed the trial court that he wanted Dickhaus to represent him after Low's participation was ruled out. Pet. App. 3a-4a; U.S. Br. 19 n.4. Respondent also does not argue that he took any steps to hire counsel other than Dickhaus during the four-month period following the magistrate judge's initial decision that Low would not be permitted to represent him. *Ibid.*[7] Respondent asserts (Br. 28) that his "lack of additional resources" prevented him from hiring another counsel to assist or replace Dickhaus. Yet respondent was apparently financially able to retain not only Dickhaus, but also two out-of-state counsel, Fahle, from Texas, and Low, from California, to represent him in the initial proceedings, Pet. App. 2a-4a, and respondent has continued to employ both Low and Dickhaus in connection with the reversal and new trial ordered by the court of appeals. Resp. Br. 8.

2. Respondent also argues (Br. 41) that because a defendant's choice of counsel has an effect that "pervade[s] the entire criminal proceeding," it is impossible to isolate or assess the effect of an erroneous denial of counsel of choice on the fairness of the proceeding. That contention, however, can

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[7] Respondent states (Br. 5) that because Dickhaus "became increasingly concerned that Low's status would not be resolved before the trial," counsel filed a motion for a continuance in the trial date, which was denied. But counsel did not move for a continuance until July 2, 2003, just three days before the trial began on July 5, 2003. Dist. Ct. Docket Entry Nos. 257, 259.

equally be said of the right to the effective assistance of counsel. A defendant nonetheless under *Strickland* and *Mickens* must show prejudice despite the fact that counsel's deficient performance or representation of conflicting interests may permeate the entire trial. U.S. Br. 26-27.

Respondent's amicus, the National Association of Criminal Defense Lawyers, argues that lawyers are not fungible (Br. 4-7) and that a defendant's trust and confidence in his counsel enables the attorney to provide effective representation (Br. 8-15). Respondent relatedly contends that when a defendant chooses a lawyer, counsel becomes the defendant's "alter ego" whose role at trial is similar to the "director" of a "Shakespearean tragedy." Br. 41-42 (internal quotation marks omitted). Those observations, however, are not uniquely applicable to those few defendants who can afford to select their own counsel. Respondent's position would create the anomaly that defendants with appointed counsel must show prejudice to obtain a reversal (even if their "Shakespearean director" performs deficiently), while defendants with means to select their counsel receive an automatic reversal of their conviction.

There is also no basis for presuming that second-choice counsel will have a breakdown in his relationship with his client or that he cannot "direct[]" the trial according to the defendant's essential desires. Indeed, even apart from any action by a court, a defendant's first-choice counsel may simply decline the representation for any number of reasons (*e.g.*, counsel is too busy or is unwilling to take on the representation). The defendant in those instances is presumably able to retain other counsel to his liking or who can adequately serve as the defendant's "alter ego." The same is true of a defendant who is denied counsel of choice by a court.

D. The Proper Disposition Of This Case Is A Remand To Permit Respondent To Make A Showing Of Prejudice

1. Respondent argues (Br. 11, 44-45) that even if the denial of counsel of choice is not a structural defect, the government has not made a showing that the error was harmless under *Chapman* v. *California*, 386 U.S. 18 (1967). As discussed above, the denial of counsel of choice, like the ineffective assistance of counsel, does not violate the Sixth Amendment and warrant reversal of a conviction unless the defendant shows prejudice. Thus, this Court should reverse the judgment below and remand the case to the court of appeals to give respondent the opportunity to demonstrate prejudice from the disqualification of Low.[4]

In any event, even if the Court were to conclude that the denial of counsel of choice is a non-structural error that is subject to a showing of harmless error by the government, whether the government has met its burden in this case is not properly before this Court. Because the court of appeals concluded that the denial of respondent's counsel of choice required automatic reversal, the court of appeals did not address the impact of the error on the outcome of the trial. This is not the rare case in which the Court should address the issue in the first instance. See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 25 (1999).

The same considerations apply to respondent's contentions that the judgment below should be affirmed on the alternative ground that respondent can demonstrate prejudice, either based on an "identifiable difference in the quality of representation" between Low and Dickhaus, Br. 47 (quoting *Rodriguez* v. *Chandler*, 382 F.3d 670, 675 (7th Cir. 2004), cert. denied,

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[4] Alternatively, if respondent wishes to develop the factual record further, he would have the opportunity to raise his Sixth Amendment claim on collateral review. See U.S. Br. 23 n.6.

543 U.S. 1156 (2005)), or because Low's defense strategy "would have created a 'reasonable probability that * * * the proceeding would have been different,'" Br. 47-48 (quoting *Strickland*, 466 U.S. at 694). Respondent does not dispute that an inquiry into whether a defendant was prejudiced is properly performed in collateral proceedings so that a record can be developed before the trial court. U.S. Br. 23 n.6; see Resp. Br. 34 ("requiring defendants to show prejudice will necessitate post-conviction evidentiary hearings"). Accordingly, the trial court, not this Court in the first instance, should conduct whatever evidentiary hearings may be warranted and then determine, based on the standard of prejudice adopted by this Court, whether respondent has met his burden. For instance, no court has made any findings of fact concerning respondent's assertions about the differences in trial strategies between Low and Dickhaus. Resp. Br. 40, 46-48.

2. Respondent has not shown that Dickhaus's representation had any affect on the outcome of the trial. Contrary to respondent's suggestion (Br. 45), the government had extensive evidence of his guilt. Around 2 a.m. at a convenience store parking lot, respondent delivered approximately $10,000 to Jorge Guillen hidden in a taped oatmeal box to pay drug couriers. 3 Tr. 42-46. Officers recovered from respondent's residence more than $100,000 secreted behind a kitchen baseboard, rubber-banded cash, vacuum-sealed plastic baggies strewn about the floor, rolls of larger bags, black duct tape, and gloves. *Id.* at 56-58, 63-66. A government agent also testified that he monitored a conversation between respondent and Guillen that evidenced respondent's involvement in the drug conspiracy. *Id.* at 34-36. Moreover, during a traffic stop, respondent lied to an officer by stating that he lived in Mexico, did not know anyone in the area, and had no residence in the area. *Id.* at 49. When advised of the officer's

possession of the oatmeal box and the monitored conversation, respondent hung his head and replied "This is bad." *Id.* at 50. In addition to Jorge Guillen, the government also introduced the testimony of two witnesses who directly implicated respondent in the conspiracy, 1 Tr. 73-89 (Josue Guillen), 2 Tr. 56-71 (Margarito Beltran), as well as a witness who testified about respondent's prior dealings in cocaine, marijuana, and methamphetamine, 3 Tr. 220-223 (Michael Marcus).

Respondent contends (Br. 46-48) that Low's post-trial cross-examination of one of the witnesses, Jorge Guillen, demonstrates that Low's "aggressive questioning" style would have undermined the testimony of Guillen, who testified at trial that respondent delivered cash to Guillen to pay drug couriers. According to respondent (Br. 46), Low's questioning revealed that Guillen was a "liar" and that Guillen asked respondent to deliver the cash to assist Guillen's sick daughter. Guillen's deposition testimony, however, reaffirms that respondent was delivering the cash in order to pay for drugs, and at no time during the deposition did Guillen recant his testimony as to respondent's involvement in the conspiracy. Resp. Br. App. 2a. Moreover, Low's cross-examination of Guillen is not a realistic portrayal of how Low would have cross-examined the witness at trial. Low's cross-examination took place not in a courtroom before a judge and jury, but during an unsupervised deposition in which Low, after having the benefit of Guillen's earlier trial testimony, was given an unfettered opportunity over many hours to question the witness.

More importantly, Low's theory that respondent gave Guillen nearly $10,000 hidden in a taped oatmeal box to help Guillen's sick daughter would have been scarcely plausible. Respondent does not address how Low would have explained to the jury why the money was delivered in cash, secreted in a oatmeal box, or delivered in the middle of the night at a

convenience store. Nor does respondent explain how Low could have convinced the jury to disregard respondent's discussion of drugs during a monitored telephone conversation, the incriminating items uncovered at respondent's residence, his client's mendacity to an officer, or the testimony of the other witnesses.

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For the foregoing reasons and those stated in our opening brief, the court of appeals' decision should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2006